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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

REPLY OF PETITIONER

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TABLE OF CONTENTS

Page

I. Respondents Have Failed To Answer The Compelling Reasons For Granting Certiorari 2

II. The Other Arguments Advanced By Respondents Neither Support The Decision Below Nor Justify Denial Of Certiorari 9

CONCLUSION 16

TABLE OF AUTHORITIES

CASES AND ADMINISTRATIVE PROCEEDINGS:

Aberdeen & Rockfish R.R. v. *SCRAP*, 442 U.S. 289 (1975) 15

Bell Telephone Company of Pennsylvania v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) 2, 8

Business Executives' Move for Vietnam Peace v. *FCC*, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom. CBS* v. *Democratic National Committee*, 412 U.S. 94 (1973) 15

CBS v. *Democratic National Committee*, 412 U.S. 94 (1973) 15

Domestic Public Radio Services, 21 Fed. Reg. 4724 (Sept. 4, 1956) 12

FCC Docket No. 19117, 39 F.C.C.2d 131 (1973) 10, 11

Home Box Office, Inc. v. *FCC*, D.C. Cir. No. 75-1280 *et al.* (March 25, 1977), *cert. denied*, 46 U.S.L.W. 3216 (October 4, 1977) 13

Interstate Broadcasting Co. v. *FCC*, 265 F.2d 598 (D.C. Cir. 1959) 12

National Broadcasting Co. v. *FCC*, 362 F.2d 946 (D.C. Cir. 1966) 12

Press Wireless, Inc. v. *FCC*, 264 F.2d 372 (D.C. Cir. 1959) 6

Press Wireless, Inc., 25 F.C.C. 1466 (1958), *aff'd per curiam sub nom. Press Wireless, Inc.* v. *FCC*, 264 F.2d 372 (D.C. Cir. 1959) 6

Page

SCRAP v. *United States*, 371 F. Supp. 1291 (D.D.C. 1974), *rev'd sub nom. Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289 (1975) 15

Specialized Common Carrier Services, 29 F.C.C.2d 870, *recon. denied*, 31 F.C.C.2d 1106 (1971), *aff'd sub nom. Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) ..... passim

Udall v. *Tallman*, 380 U.S. 1 (1965) 10

United Telegraph Workers v. *FCC*, 436 F.2d 920 (D.C. Cir. 1970) 6

Washington Utils. & Transp. Comm'n v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) .. 2

CONSTITUTION AND STATUTES:

Communications Act of 1934:

Section 214, 47 U.S.C. § 214 ..... passim

Section 409, 47 U.S.C. § 409 13

Federal Aviation Act, Section 401, 49 U.S.C. § 1371 ... 5

Interstate Commerce Act, Section 1(18), 49 U.S.C. § 1(18) 5

FCC RULES:

Section 21.2, 47 C.F.R. § 21.2 (1976), *adopted* 21 Fed. Reg. 4724 (September 4, 1956) 12

Sections 1.203(a), 1.207(a), 47 C.F.R. §§ 1.203(a), 1.207(a) (1976) 13

MISCELLANEOUS:

MCI Motion to Strike Consolidated Answer to Motion and Cross-Motion For Leave to File Copies of Commission Decision, May 15, 1974, filed in *Washington Utils. & Transp.* v. *FCC*, 513 F.2d 1142 (9th Cir. 1975)- 4

MCI Brief, FCC Docket No. 19896, January 21, 1974 .. 10

MCI Comments, FCC Docket No. 18920, October 1, 1970 10

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REPLY OF PETITIONER

Certiorari has been sought to review the judgment below by AT&T in this case and by the FCC and United States Independent Telephone Association in Nos. 77-420 and 77-436.[1] This reply is filed by AT&T in response to oppositions to certiorari filed by MCI and by Southern Pacific Communications Company.

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[1] Amici briefs in support of certiorari have been filed by the National Association of Regulatory Utility Commissioners and by the state authorities or utility commissions in the District of Columbia, Michigan, New Jersey, Ohio, Tennessee, Virginia and West Virginia.

I. Respondents Have Failed To Answer The Compelling Reasons For Granting Certiorari.

1. AT&T's petition demonstrated that there is a direct conflict on the scope of specialized carrier authority between the District of Columbia Circuit in this case and decisions of the Ninth and Third Circuits.[2] The District of Columbia Circuit held that MCI is free to provide any service it chooses including ordinary long-distance telephone service. Pet. App. 1a. The clear language of the Ninth Circuit[3] and the Third Circuit[4] reflects their contrary conclusion that specialized carriers are limited to providing private line service.

MCI seeks to brush aside the pertinent language of the conflicting decisions as "merely prefatory" (MCI Br. 15) and—in the case of the Ninth Circuit—as "a simple general description of the services proposed in the specific applications then before the Commission."

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[2] *Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); *Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

[3] *E.g.*, "The [specialized carrier] business involved is that of providing specialized private or leased line communications services . . . as distinguished from . . . long-distance toll telephone service." 513 F.2d at 1155. "'[E]ntry by more than one private line carrier should generally be feasible . . . .'" *Id.* at 1167, n. 33. "The market for standard voice communications service is not affected . . . ." *Id.* at 1156, n. 21.

[4] Specialized carriers are permitted to provide services "within the rubric of 'private line services'." 503 F.2d at 1260-61. "[T]he public interest favored the entry of specialized carriers into the full field of private line services." *Id.* at 1270. The FCC determined to permit "competition in the provision of interstate private line communications . . . ." *Id.* at 1273 (quoting *Specialized Carrier* decision).

MCI Br. 32-33.[5] The language was clearly not merely "prefatory" or "descriptive" because, in both cases, the governing legal rules compelled the courts to determine what services were being authorized or affected by the orders involved. AT&T's petition demonstrated this by describing the applicable rules and quoting from the courts' own reasoning (AT&T Pet. 13-16) and MCI does not even attempt to answer this showing.

MCI (MCI Br. 32-35) then attempts to distinguish the Ninth and Third Circuit decisions on the ground that the ultimate issues in those cases differed from the ultimate issue presented below. See also SPCC Br. 8-9. However, in order to decide the ultimate issues in each of the three cases, it was necessary for each of the courts to determine what class of service the specialized carriers were entitled to provide; and, on this central issue, the District of Columbia Circuit clearly did disagree with the Ninth and Third Circuits. The resulting disagreement is as much a conflict as to holdings—legal determinations which are necessary to the resolution of a case—as any conflict imaginable.[6]

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[5] This is itself a damning admission by MCI. The class of "services proposed in the specific applications" were precisely what the FCC considered in its specialized carrier proceedings; Section 214 (c) provides that the Commission may issue such certificates "as applied for"; and MCI's authority is therefore clearly confined to the class of services described in the applications "then before the Commission." MCI Br. 32-33.

[6] For example, MCI asserts that the issues in the Ninth Circuit were, *inter alia*, "whether the FCC could authorize competition at all." MCI Br. 32. Similarly, in the decision below, the ultimate issue could be described as whether the FCC properly rejected MCI's Execunet tariff. However, in order to decide "whether the FCC could authorize competition at all" on the basis of the record before it and whether the FCC had validly rejected Execunet's tariff, the court in each case was required to determine what competition the FCC had authorized.

MCI's attempt to deny that the Ninth Circuit and Third Circuit considered and reached conclusions on the scope of competition issue is especially startling in light of the representations made in MCI's own briefs and oppositions to certiorari in those cases. See AT&T Pet. 8 and Pet. App. 4d, 6d. In addition, prior to the Ninth Circuit decision, MCI filed a pleading in that court stating: "Specialized carriers are *not* authorized to furnish the equivalent or [sic] ordinary long distance telephone service . . . ."[7] MCI's document continued:

> "They [the specialized carriers] proposed, and have been authorized, to provide the full range of *private line* services. They have never proposed—and have not applied for the facilities required for—the provision of long distance service, which involves the ability to reach every other telephone in the system." *Id.* at 10 (emphasis in original).

2. The lower court held that the FCC could not grant a certificate of public convenience and necessity for facilities to provide only a limited class of service—even though only such a limited grant had been sought—without making an affirmative determination that it would be contrary to the public interest for the applicant to provide other services which the applicant had never proposed. See Pet. App. 29a-30a. AT&T's petition for certiorari showed that this extraordinary requirement was contrary to the plain language of Section 214, to the statute's rationale, to its consistent administrative construction and to common sense. AT&T Pet. 18-25.

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[7] MCI motion to strike consolidated answer to motion and cross-motion for leave to file copies of commission decision, p. 9, May 15, 1974, filed in *Washington Utils. & Transp. Comm'n* v. *FCC*, *supra* (emphasis in original).

Even if the lower court's decision were only arguably wrong, the importance of the issue would warrant certiorari. Section 214 is a keystone provision in the FCC's regulatory plan; and parallel statutory provisions are of similar importance to other regulatory agencies.[8] In all events, the arguments of MCI and Southern Pacific do not even begin to shore up the lower court's construction of the statute, which is unsupported by its language and contrary to its purpose and history, and which would impose enormous burdens on administrative agencies called upon to make public interest determinations with respect to services not even proposed by applicants for specific service authorizations.

MCI first attempts to suggest (MCI Br. 16) that there is a pure dichotomy between facilities authorizations and the services to be provided over the facilities, that Section 214 is only concerned with the former question, and that the latter is controlled wholly by tariff filing provisions. Whether a new facility is in the public interest or harmfully duplicative may depend on what services it will be used for; and even the lower court rejected the dichotomy suggested by MCI, agreeing that "Section 214(c) does . . . authorize the Commission to restrict the services that may be offered . . . ." Pet. App. 24a. Nor is it true (MCI Br. 16) that a new service may invariably be provided over existing facilities merely by filing a tariff,[9] since it is well established

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[8] *E.g.*, Interstate Commerce Act, Section 1(18), 49 U.S.C. § 1(18); Federal Aviation Act, Section 401, 49 U.S.C. § 1371.

[9] MCI's citation of two railroad cases (MCI Br. 16) does not support its position. In each case, it was found that the ancillary use of trucks by the rail carriers was not subject to the ICC's authority to certify railroad tracks, terminals and similar rail facilities. Here, however, MCI's Execunet service involves the use of communication facilities admittedly subject to the FCC's certification authority.

that a carrier may not lawfully file tariffs to provide a service beyond its basic certificate or grant of authority.[10]

Contrary to MCI's assertion (MCI Br. 17-18), this reading of the Act is wholly consistent with past practice. Where a railroad or telephone company or Western Union proposes to offer a service or engage in any other activity contrary to its certificated authority, it, too, must seek an expansion or change in authority from the Commission.[11] Moreover, MCI's argument has nothing to do with the lower court's "affirmative determination" requirement for which neither MCI nor the lower court provided any precedent whatever.

So far as MCI seeks to support the lower court's actual holding, it relies primarily on the language in Section 214(c) that the Commission may attach "conditions" to a certificate and then argues that the lower court was "merely restating" this express command when it called for affirmative determinations to prevent a carrier from providing service it had never proposed

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[10] *Press Wireless, Inc.* v. *FCC*, 264 F.2d 372 (D.C. Cir. 1959) *aff'g per curiam Press Wireless, Inc.*, 25 F.C.C. 1466 (1953). See other cases involving the CAB and ICC cited at AT&T Pet. 24 n. 42.

[11] *United Telegraph Workers* v. *FCC*, 436 F.2d 920 (D.C. Cir. 1970), cited by MCI actually contradicts its position. That case upheld Western Union's right to offer its new "Mailgram" service on an experimental basis without obtaining an expansion of its Section 214 authorization only after first finding that the service, so far as Western Union's involvement was concerned, did not involve a substantial change in existing services. 436 F.2d at 924-25. Execunet, which the FCC has found to be different in all material respects from private line service, does involve a substantial change in service departing from the terms of MCI's existing authority and it therefore does require a new Section 214 authorization.

to provide. MCI Br. 18. MCI simply ignores the preceding language in Section 214(c)—providing that the Commission can issue a certificate "as applied for"—which is controlling in this case. MCI never proposed in the *Specialized Carrier* proceeding or elsewhere to provide any service other than private line service, so no further "affirmative" restrictions were necessary to limit MCI's grant to what it had sought.[12]

3. AT&T's petition showed that the lower court's decision would have serious adverse consequences for common carrier regulation going far beyond the immediate controversy over long distance telephone service. Respondents have not in any way dispelled these concerns.

First, the FCC has authorized numerous classes of limited service carriers, by codified rule, general rulemaking proceedings and individual grants, without ever making the type of affirmative determination called for by the lower court. AT&T Pet. 23, 26-27. Under the lower court's decision, havoc will be caused in this careful allocation of authorizations designed to implement national communications policy. Any limited service grant, even if based on a limited service application, may now be attacked as inconsistent with the lower court's decision even though such categories have existed since the establishment of the Communica-

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[12] MCI also argues (MCI Br. 18) that its construction is made "doubly obvious" by the final proviso to Section 214(a). That proviso, which permits minor changes in facilities and operations that do not affect the adequacy or quality of service was merely designed to avoid trivial and repetitive filings every time a piece of equipment wore out or other such minor change had to be made. It does not purport to authorize the provision of a new service by a carrier beyond the scope of its basic operating authority.

tions Act. MCI and Southern Pacific do not even advert to this consequence of the decision.

Second, AT&T's petition showed that numerous grants, major FCC policy pronouncements and even court decisions now rest on the premise that specialized carriers are limited to providing private line service; and many of them may be re-opened and invalidated if that basic assumption is overturned by the lower court's decision. AT&T Pet. 27-28.[13] MCI blandly responds (MCI Br. 38) that the prior grants have become "final and not subject to further review." The lower court's decision is no less an alteration of a previously final decision, because it removes limitations—for lack of the supposedly required "affirmative determination"—adopted in the *Specialized Carrier* case in 1970 and affirmed by the Ninth Circuit in 1975. If such a "final" limitation on specialized carrier authority can be removed retroactively, then "final" grants stemming from the same decision are no less liable to subsequent attack.[14]

Third, even if the FCC holds further proceedings to impose on the specialized carriers the restrictions everyone has long believed to be applicable, the eco-

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[13] Indeed, the Third Circuit's decision has already recognized that the interconnection orders before it would be invalid if specialized carrier authority were unlimited. See 503 F.2d at 1273.

[14] In any event, the specialized carrier grants and interconnection orders are still open to direct attack in the very courts that considered or affirmed them. AT&T cited ample authority in its certiorari petition (AT&T Pet. 28, n. 47) affirming the right of appellate courts to recall their mandates and reopen previously "final" orders to prevent fraud, serious mistake, or injustice. In light of MCI's representations that it was only authorized to provide private line service, this is clearly such a case.

nomic impact in the meantime would be severe. AT&T Pet. 29-30. MCI belittles this concern by asserting that only a limited number of transmission facilities have been utilized for the specialized and satellite carriers. MCI Br. 37-38. It is sufficient to note that MCI, SPCC and other specialized and satellite carriers already serve 150 cities with a total population of 43 million people. Moreover, even if the number of cities were far more limited, the provision of Execunet-type services threatens the destruction of a nationwide rate averaging that has long assisted in providing affordable long distance telephone rates to all people in the United States. AT&T Pet. 4.

II. The Other Arguments Advanced By Respondents Neither Support The Decision Below Nor Justify Denial Of Certiorari.

In attempting to defeat certiorari, MCI offers several different arguments—not adopted by the lower court—to support its Execunet offering and repeats its usual *ad hominum* attacks on its opponents. MCI and Southern Pacific also suggest, quite wrongly, that the need for judicial review is lessened by the lower court's remand of the case to the Commission.

1. Seeking to defend the lower court's result on grounds not adopted by the lower court, MCI first argues that the Commission's *Specialized Carrier* decision never intended to preclude specialized carriers from providing ordinary long distance service. MCI Br. 24-27. This is a plainly inaccurate contention since MCI specifically described its proposed services in the *Specialized Carrier* case as excluding ordinary long distance service,[15] since the FCC in the *Specialized*

[15] MCI stated that "MCI-type applicants propose to offer only

Carrier case repeatedly confined itself to authorizing private line competition and reasoned that ordinary long distance service would be unaffected (see, *e.g.*, 29 F.C.C.2d 870, 911, 915), and since both the FCC and MCI have repeatedly represented following the *Specialized Carrier* decision that it covered private line service but did not extend to ordinary long distance service.[16] In any event, MCI's argument represents a direct attack on the FCC's unanimous interpretation of its *own* prior decision and grants and is contrary to uniform authority affording great weight to the agency's reasonable interpretation of what the agency itself meant in a prior rule or decision. *E.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965).

MCI next asserts that even if it were limited to private line service by the *Specialized Carrier* decision, this limitation was removed by the FCC's order terminating Docket No. 19117. MCI Br. 19-20. Once again, this is a disagreement with the FCC's reading of its own prior order and lends no support to the statutory ground actually adopted by the lower court. The claim is also without merit since the FCC never

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customized point-to-point services and have no intention of attempting to compete with [AT&T] in providing local exchange or long distance toll telephone service, which account for the bulk of [AT&T] revenues." MCI comments, Oct. 1, 1970, pp. 27-28. See also other quotations at Pet. App. 3d-4d.

[16] MCI's statement to the Ninth Circuit quoted at p. 4, above, is only one of many such statements. As another example, in the FCC proceeding that led to the Third Circuit decision, MCI stated to the Commission: "[The *Specialized Carrier* proceeding] dealt with private line services" and concerned the question whether business and data customers would benefit from competition in "this limited corner of the overall common carrier communications market." MCI brief, Jan. 21, 1974, p. 40. See also Pet. App. 4d-7d.

suggested in its order in Docket No. 19117 that it was altering the *Specialized Carrier* decision,[17] and both MCI and the FCC continued to construe the *Specialized Carrier* decision to exclude ordinary long distance service well after the February 1973 order terminating Docket No. 19117.[18]

Finally, MCI suggests that Execunet is in fact a private line service rather than a form of ordinary long distance telephone service. MCI Br. 7-9, 29-31. The FCC, however, found that Execunet had "all" the essential characteristics of switched public message service and none of the characteristics of private line service (Pet. App. 35b) and its determination was supported by copious findings and reasoning. Pet. App. 29b-36b, 64b-70b. MCI's own statements and literature confirm that Execunet provides a basic capability of using any (push-button) telephone in one city to reach any telephone in a distant city,[19] the facilities are used in turn by all customers and are not dedicated to any

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[17] Docket No. 19117 was initiated prior to the *Specialized Carrier* decision proposing new rules primarily in order to maintain the *status quo* in certain respects pending that decision. 39 F.C.C.2d at 133. When the *Specialized Carrier* decision was adopted, the FCC terminated Docket No. 19117 without adopting the originally proposed rules on the ground that the *Specialized Carrier* decision had made them unnecessary. *Id.*

[18] In addition, after February 1973, FCC grants of individual MCI applications continued, just as they had done before, to refer specifically to use of the facilities for "interstate private line service" or specialized service "consistent with the Commission's decision" in the *Specialized Carrier* case. Excerpts appear at Pet. App. 9f-13f.

[19] Execunet can also be used to originate calls from dial telephones by using a small tone generator to duplicate push button signals. See Pet. App. 3a, n.3.

individual customer, and calls are paid for essentially on a call-by-call basis subject to a monthly minimum.[20] Even in a disputable case, the agency's expert judgment in classifying a particular type of service would be compelling,[21] and the lower court did not purport to rest its decision on any disagreement with the Commission's categorization of Execunet.

2. MCI spices its brief with its now-familiar litany of *ad hominum* attacks on the Commission and AT&T. Those directed at the Commission complain essentially of the "celerity" of the Commission's action (MCI Br. 10) and imply that the Commission has never given the matter adequate attention. MCI Br. 11. The record of Commission proceedings in this case, stretching over an entire year, amply refutes this claim. For almost a decade, the Commission has sedulously fostered the specialized carriers and resolved countless disputed cases and issues in their favor. So far as it acted with "celerity" in this case, this reflects noth-

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[20] These characteristics clearly demonstrate that Execunet is in no sense a private line service. Although MCI also claims that the definitions of private line service and public switched message service are *ad hoc* creations (MCI Br. 29-30), in fact the definitions have been contained in the Commission's rules for more than twenty years (*see* Domestic Public Radio Services, 21 Fed. Reg. 4724 (Sept. 4, 1956), *codified at* 47 C.F.R. § 21.2 (1976)). The application of these long-standing definitions was singularly easy in this case because MCI clearly offers service on a "non-exclusive message-by-message basis" with a "separate connection for each occasion of use" rather than provision of facilities between "two or more designated points" which are "set aside for the exclusive use or availability for use" of a particular customer and authorized users. 47 C.F.R. § 21.2 (1976).

[21] *Interstate Broadcasting Co.* v. *FCC*, 265 F.2d 598, 605 (D.C. Cir. 1959); *National Broadcasting Co.* v. *FCC*, 362 F.2d 946, 958 (D.C. Cir. 1966).

ing other than the blatant character of MCI's violation in offering service so clearly outside the scope of its authority. The Commission's ultimate determination is supported by a lengthy and scrupulously detailed opinion by a unanimous Commission.[22]

MCI also alleges, as it did in the court below, that AT&T engaged in impermissible *ex parte* contacts which may have influenced the Commission. MCI Br. 10-11. AT&T advised the Commission, prior to the initiation of *any* proceedings involving Execunet, that the FCC ought to examine the matter. This was entirely permissible under the applicable statutes (Communications Act, Section 409(c), 47 U.S.C. § 409(c)), under the Commission's *ex parte* rules (47 C.F.R. §§ 1.1203(a), 1.1207(a) (1976)), and under even the most far-reaching of the applicable precedents. *Home Box Office, Inc.* v. *FCC,* D.C. Cir. No. 75-1280 *et al.* (March 25, 1977), *cert. denied,* 46 U.S.L.W. 3216 (October 4, 1977).

Moreover, AT&T's requests that the Commission examine the matter occurred prior to the FCC's original letter order in July 1975. Following that order and MCI's appeal, the lower court permitted an entirely new set of proceedings, because MCI was attempting to make additional arguments and defenses of Execunet service not previously presented to the Commission. Those proceedings involved full briefs and lengthy oral argument before the Commission, affording all

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[22] MCI also complains (MCI Br. 12-13) that the FCC voted on the case immediately after oral argument. This is, of course, common practice in appellate courts. Moreover, the FCC had the briefs available for several months before oral argument and MCI said nothing in its oral argument that it had not said before.

parties opportunity to make a full and fresh presentation on all relevant issues.

3. The oppositions of both MCI (MCI Br. 35-36) and Southern Pacific (SPCC Br. 10-11) suggest that review is unnecessary because of the lower court's remand and the possibility of further agency proceedings. It is unclear whether respondents are arguing that the FCC can cure in further proceedings the difficulties created by the lower court's decision or whether they are suggesting that the legal issues may be more fully developed after remand. On either branch of the argument, respondents are patently wrong.

The lower court's decision has determined, as a matter of statutory construction, that the Commission's establishment of limited-service authority for common carriers is invalid in the absence of a specified "affirmative determination." The decision undermines the entire regime of limited service carriers that the Commission has created during the four decades of regulation; and, for the future, it promises that no proceedings for a limited service grant can be completed without laborious and wholly unnecessary consideration of services which the applicant has never proposed to provide. Nothing the Commission can do in further proceedings to limit the specialized carriers' particular operations can erase the lower court's statutory requirement as it applies to all other classes of carriers and all future proceedings.

Even if all other classes of carriers are ignored and future grant proceedings are put to one side, review by this Court now is essential to avoid extraordinarily protracted and wasteful litigation before the Commission and the lower appellate court respecting the va-

lidity of prior specialized carrier grants and the validity of Commission orders in numerous related matters including interconnection. See AT&T Pet. 27-29. In addition, review now is necessary to prevent a serious adverse effect on rates paid by the public which could result from unlimited expansion of Execunet-type services during the extended period in which further Commission proceedings would be undertaken. See *id.* at 29-31.

This Court has repeatedly granted certiorari where a lower court has ordered further agency proceedings on the basis of an improper legal ruling. *E.g., Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289 (1975), *rev'g SCRAP* v. *United States*, 371 F. Supp. 1291 (D.D.C. 1974); *CBS* v. *Democratic National Committee*, 412 U.S. 94 (1973), *rev'g Business Executives' Move For Vietnam Peace* v. *FCC*, 450 F.2d 642 (D.C. Cir. 1971). Review now in the present case is clearly warranted since further agency proceedings cannot affect the statutory issue or assuage the need for its definitive resolution by this Court.

Finally, the case presented is clearly not "premature." The basic statutory issue was decided by the lower court explicitly and without qualification. The further Commission proceedings contemplated by the lower court would have nothing to do with this basic question, as the lower court makes quite clear. Pet. App. 31a. Nothing whatever would be gained by delaying review in this case. Instead, there would be a substantial waste of administrative and judicial resources, as well as prolonged uncertainty and confusion, if certiorari were denied.

CONCLUSION

For the reasons stated above and in AT&T's petition, certiorari should be granted.

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